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No. 647

In the Supreme Court of the United States

OCTOBER TERM, 1937

BATES MANUFACTURING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

REPLY MEMORANDUM FOR PETITIONER

CHARLES B. RUGG
Counsel for Petitioner

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In its Brief in Opposition to the Petition for Certiorari (p. 4) the Government suggests that if the Rules of Civil Procedure for the District Courts of the United States, adopted by this Court on December 20, 1937, become effective, the question raised in the instant case will probably not arise in the future, and that consequently the question is not one of general importance. Reference is made to Rules 3 and 4, and to the footnote to Rule 4 contained in the Final Report of the Advisory Committee.

Rule 3 provides:

> "A civil action is commenced by filing a complaint with the court."

Rule 4 provides:

> "Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. * * * "

The Government appears to be of the opinion that, whatever the rule now is under the Tucker Act, Rule 3 leaves no room for doubt that in the future the filing of the complaint will mark the commencement of the suit for purposes of statutes of limitations. This view, we submit, is erroneous.

A footnote to Rule 3 appearing in the Report of the Advisory Committee dated April, 1937, indicates that the Committee considered that the Rule left open the question whether the mere filing of a complaint would stop the running of a statute of limitations. In that footnote the Committee said:

> "When a federal or state statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of the complaint stops the running of the statute or whether any further step is required, such as service of the summons and complaint or their delivery to the marshal for service."

As pointed out in a footnote to Rule 4 appearing in the Final Report of the Committee, that rule, as revised, reduces the chance of questions arising under statutes of limitations because there will be no appreciable delay between the filing of the complaint and the delivery of the summons to the person authorized to effect service. Nevertheless, it is clear that the Rules do not purport to settle the question.

Moreover, if the decision of the court below in the instant case is sound, there would appear to be grave doubt whether the Rules could settle that question as regards suits against the United States. The court below held in effect that service of a copy of the petition on the United States Attorney within the period allowed by the statute of limitations is one of the conditions upon which the United States has consented to be sued. If that is a correct interpretation of the Tucker Act, and service within the limitation period is in the nature of a jurisdictional requirement, then it would appear that such requirement could not be eliminated by the Rules. The enabling statute under which the Rules were adopted authorized this Court to prescribe merely procedural rules, and specifically provides that the rules shall not abridge, enlarge nor modify the substantive rights of any litigant.

Respectfully submitted,

CHARLES B. RUGG,
Counsel for Petitioner.

January, 1938